

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 22, 2005

STATE OF TENNESSEE v. MITCHELL PRESNELL

**Appeal from the Circuit Court for Cocke County
No. 6413 Rex Henry Ogle, Judge**

No. E2004-00266-CCA-R3-CD - Filed August 17, 2005

JAMES CURWOOD WITT, JR., J., concurring.

I join Judge Hayes in concurring in the result regarding the trial court's failure to instruct on lesser included offenses. I believe that an analysis of various jury instructional errors suggests that the legislature was empowered to enact the 2001 amendment (effective 2002) to Tennessee Code Annotated section 40-18-110.

First of all, we should recognize that, prior to the amendment of section 40-18-110, Tennessee Rule of Criminal Procedure 30 was construed to mean that a defendant aggrieved of the trial court's omission of a jury instruction was obliged to request a special instruction or make a timely, contemporaneous objection. *State v. Cravens*, 764 S.W.2d 754 (Tenn. 1989); *State v. Townes*, 56 S.W.3d 30, 36 (Tenn. Crim. App. 2000); *State v. Haynes*, 720 S.W.2d 76, 84-85 (Tenn. Crim. App. 1986). Thus, although former Code section 40-18-110 required the trial court to instruct on lesser included offenses even when the defendant did not request the charge, the thrust of amended Code section 40-18-110 is in keeping with the general rule that an aggrieved party must act in a timely manner to address the omission of a jury instruction. Essentially, the amendment of section 40-18-110 renders the omission of an instruction on a lesser included offense subject to the general rule requiring a request or an objection to address omitted instructions.

That said, the obvious question is whether the omission of lesser included offense instructions may be handled in such a manner.

Tennessee courts have said that "an objection or special request for an omitted charge is excused when the charge relates to an issue that is 'fundamental to the defense and essential to a fair trial.'" *Townes*, 56 S.W.3d at 36 (quoting *Poe v. State*, 212 Tenn. 413, 420, 370 S.W.2d 488, 491 (1963)). In *Poe*, our supreme court said that an instruction on the defense

of alibi “was . . . fundamental and . . . necessary to a fair trial,” and the failure to give the alibi instruction was reversible error despite the absence of a request for it. *Id.* Additionally, the *Poe* court said that the then-existing harmless error statute, Tennessee Code Annotated section 27-117, did not “preclude a reversal for an error affecting the result of the trial or depriving the accused of his constitutional right to a fair trial by jury.” *Id.* at 419-21, 370 S.W.2d at 491-92; see Tenn. Code Ann. § 27-117 (precluding reversal for non-prejudicial error) (repealed, 1981 Pub. Acts ch. 449, § 1(8)). It is unclear to me whether the court determined that the statutory harmless error mandate had no sway in errors of a constitutional nature or whether no harmless error analysis was apt in *Poe*.

At any rate, and especially if the *Poe* court intended to pretermite a harmless error analysis, one might surmise that the term “fundamental” used in *Poe* equates to the concept of a “structural” issue more recently articulated by our supreme court. For example, in *State v. Garrison*, 40 S.W.3d 426 (Tenn. 2000), our supreme court considered the nature of the trial court’s error in failing to instruct on all of the elements of the charged offense. After proclaiming that, in Tennessee, the constitutional right to a jury trial embraces “a right to a correct and complete charge of the law,” the court held that the defendant’s “rights were violated because the trial court’s charge omitted an essential element of the offense.” *Id.* at 432. Nevertheless, the court held that the error, though constitutional in nature, was harmless beyond a reasonable doubt. *Id.* at 435. Before reaching the conclusion that the issue was subject to harmless error analysis, the court determined “whether the trial court’s error in omitting an essential element of an offense from the jury is structural,” one that would “defy harmless-error review.” *Id.* at 433-34. The court quoted *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999), for the notion that structural errors “infect the entire trial process’ and necessarily render a trial fundamentally unfair.” *Garrison*, 40 S.W.3d at 434 (quoting *Neder*, 527 U.S. at 8-9, 119 S. Ct. at 1833-34); see also *Sullivan v. Louisiana*, 508 U.S. 275, 280, 113 S. Ct. 2078, 2082 (1993); *State v. Robert Faulkner*, 154 S.W.3d 48, 60-61 (Tenn. 2005) (commenting that an erroneous instruction, if structural, would not be subject to harmless error analysis). In *Garrison*, of course, the omitted element instruction was deemed not structural; nevertheless, *Poe* and *Garrison* both referred to the fundamental fairness of the proceeding being impaired by the omission of an instruction. *Poe* tells us that instructional omissions in that situation demand reversal despite the aggrieved party’s failure to timely object or request the instruction. I infer that, for cases not included in this rubric and not governed by the former version of Code section 40-18-110, the general rule requiring a request or an objection would apply.

Moving to the rubric of omitting a lesser included offense instruction, our supreme court, after stating that “an erroneous failure to instruct on lesser-included offenses is a constitutional error,” *State v. Ely*, 48 S.W.3d 710, 726 (Tenn. 2001), has applied the harmless error standard for constitutional errors, *id.* As such, then, the failure to instruct the jury on lesser included offenses is not a structural or fundamental error requiring automatic reversal.

If, then, the omission of an instruction on a lesser included offense, though constitutional in nature, is not so fundamental as to require automatic reversal, it seems reasonable to conclude that the general rule requiring a request or objection applies. In other words, based on *Poe*, the requirement of a request or an objection would not be constitutionally significant. At least, I know of no adjunct to the constitutional right of jury trial that would

prohibit procedural waiver of the right to *submit issues* to the jury for resolution. See *Momon v. State*, 18 S.W.3d 152, 161 (Tenn. 1999) (stating that a “fundamental right” must be “waived personally by the defendant”). Compare *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983) (stating that “the accused has the ultimate authority to make certain fundamental decisions regarding the case, *as to whether to . . . waive a jury*”) (emphasis added) with *United States v. Booker*, ___ U.S. ___, ___, 125 S. Ct. 738, 769 (2005) (commenting that violations of the right to have a jury determine certain facts in sentencing is subject to “ordinary prudential doctrines” such as “whether the issue was raised below and whether it fails the ‘plain-error’ test”). Indeed, our judicial system affords attorneys significant discretion in formulating trial strategy and tactics, including decisions about the use or rejection of evidence to be submitted to the jury. See *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997); *Cauthern v. State*, 145 S.W.3d 571, 601-02 (Tenn. Crim. App. 2004), *perm. app. denied* (Tenn. 2004). Thus, I infer from recent caselaw development that, were it not for the dispensation granted in the former version of Code section 40-18-110, omissions of lesser included offense instructions would have been subject to the general rule that a claim of such an omitted instruction is waived unless a request or objection is timely made.

In that context, the legislature did not trespass on constitutional soil when it amended the statute. In the face of the general rule for raising issues of omitted instructions, the amendment adds only the requirement that the instruction request be in writing. Thus, in the present case, the claim to omitted lesser included offense instructions is waived.

JAMES CURWOOD WITT, JR., JUDGE